Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NAJWA BAKAL,
Petitioner,
V.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, AND
IMMIGRATION AND NATURALIZATION SERVICE (INS),

Respondents.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

Petitioner is Najwa Bakal, a native of Baghdad, Iraq and the mother of two minor United States citizens who had removal proceedings commenced against her when she sought an adjustment of status in conjunction with being married. The Immigration and Naturalization Service (INS) commenced removal proceedings under 8 U.S.C. § 1229a against the alien petitioner. After appearing at two of the scheduled hearings, the Immigration Judge ordered *in absentia* that Petitioner be deported to Iraq when she failed to appear at the final hearing. Claiming it lacked jurisdiction over the matter, the Board of Immigration Appeals (BIA) refused to hear her timely appeal. Relying on 8 C.F.R. § 214.15, the court of appeals affirmed this refusal to exercise jurisdiction. The questions presented are:

1. Do federal courts have jurisdiction to review *in absentia* removal orders under statutory language contained in 8 U.S.C. § 1229a(b)(5)(D) providing for judicial review of such orders even though a regulation states there shall be no judicial review of *in absentia* removal orders?

2. Was the petitioner deprived of her constitutional right to due process since she was never afforded an opportunity to appeal the determination by an immigration judge that she was removable?

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IN THE
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NO. _____

NAJWA BAKAL, PETITIONER,

V.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, AND IMMIGRATION AND
NATURALIZATION SERVICE (INS), RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

Najwa Bakal, the petitioner in this matter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and order of the court of appeals (App. *infra*. 1a - 8a) is unreported. The opinion of the court of appeals denying the INS motion to dismiss and granting Petitioner's Motion to Stay the Deportation Proceedings (App. *infra*. 9a-11a) is unreported. The order of the Board of Immigration Appeals (App. *infra*. 12a-13a) is unreported. The order of the Immigration Judge (App. *infra*. 14a - 15a) is unreported. The transcript of proceedings before the

immigration judge wherein the immigration judge made oral orders and findings, has been reprinted in its entirety in the appendix (App. *infra* 16a - 42a). The order denying rehearing (App. *infra*. 43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2003. A petition for rehearing in the court of appeals was filed on February 17, 2003, which was denied on February 28, 2003 (App. *infra*., 43a). On Petitioner's motion, the time for filing a petition for a writ of certiorari was extended by Justice Stevens on May 20, 2003 until July 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part that "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. CONST. AMEND. V.

In reference to *in absentia* removal orders, the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a(b)(5)(C)-(D), states:

> "(C) Rescission of order
> Such an order may be rescinded only--
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien. The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review
Any petition for review under section 1252 of this title of an order entered *in absentia* under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable."

The Code of Federal Regulations, 8 C.F.R. § 214.15 provides in relevant part:

"Pursuant to 8 CFR part 3, an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered *in absentia*."

STATEMENT

On August 24, 1994, the petitioner, who was a teenager at the time, was convicted of shoplifting. She was admitted to a youthful trainee program and sentenced to probation for a year. Her juvenile conviction was later expunged. Thereafter, she retained counsel who filed her paperwork to obtain lawful permanent resident status. Her

application indicated that she had not "been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance." On March 7, 1996, the petitioner's status was adjusted to lawful permanent resident status by the Immigration Naturalization Service (INS). Thereafter, on October 11, 1999, the INS commenced removal proceedings against her.

1. The removal proceedings commenced before an Immigration Judge (IJ) on February 16, 2000. Throughout the hearings, the petitioner challenged the alleged grounds for removability. The petitioner attended the first hearing which was continued until July 12, 2000 to provide the government with an opportunity to conduct further investigation (See Transcripts from hearing, App. *infra* 16a - 42a). The petitioner attended the second hearing. Once again, the hearing was continued. The petitioner, who mistakenly believed the hearing was at a different time, failed to attend the third and final hearing which was held on August 18, 2000. At that hearing, the IJ entered an *in absentia* removal order against the petitioner because she failed to appear at this hearing. Prior to entering the order, the IJ indicated that had the petitioner appeared, she would have given the legal memorandum prepared on her behalf "a great deal of consideration" (App. *infra* 41a).

2. On August 28, 2000, the petitioner appealed the determination by the immigration judge that she was removable to the Board of Immigration. Therein, the petitioner challenged the IJ's *in absentia* removal order by asserting both that the record failed to support a finding that she had been convicted of a crime of moral turpitude or that she had engaged in fraud or misrepresentation of a material fact. The appeal implied that the INS had failed to meet its burden of proof with respect to whether the petitioner was

removable.

3. Approximately 9 months after the IJ entered her *in absentia* removal order, the Board of Immigration Appeals (BIA) summarily denied the petitioner's appeal on May 31, 2001 (App. *infra* 12a - 13a). In its one page per curiam order, the Board asserted it lacked jurisdiction to review the appeal because the petitioner's only recourse was filing a motion to reopen the proceedings with the IJ under 8 U.S.C. § 1229a(b)(5)(C). Under this section, a motion to rescind an *in absentia* order and reopen the proceedings may be filed within 180 days from the date of the removal order when the alien is absent from the hearing due to exceptional circumstances. This time period had long since expired by the time the BIA ruled that this was the petitioner's only recourse.

4. On June 27, 2001, the petitioner appealed this decision of the BIA to the Sixth Circuit by filing a petition for review. The Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(D) expressly provides for limited judicial review of *in absentia* removal orders. The petition for review alleged that the petititioner's due process rights were violated when the BIA refused to exercise jurisdiction over her appeal because she was not afforded an opportunity to appeal the IJ's determination that she was removable.

5. The INS responded by asserting that the BIA properly concluded it lacked jurisdiction over the petitioner's appeal because the petitioner had failed to exhaust her administrative remedies by filing a motion to rescind and reopen her removal proceedings.

6. To ensure her continued presence in this country, the petitioner also filed a Motion to Stay the

Deportation Proceedings with the Sixth Circuit on June 28, 2001. The INS filed a Motion to Dismiss the petition, asserting that the petitioner had failed to exhaust her administrative remedies because she had not filed a motion to reopen the proceedings with the IJ. The Sixth Circuit disposed of both of these motions in an order issued on August 14, 2001. In its order, the Sixth Circuit determined that to "require [the petitioner] to file a motion to reopen prior to seeking review of the Board's order dismissing her appeal would be pointless." (App. *infra* 10a)(quoting *Ohio v. Roberts*, 440 U.S. 56, 74 (1980)("The law does not require the doing of a futile act.")).

7. On January 3, 2003, the Sixth Circuit affirmed the decision of the BIA. Notwithstanding the plain language of 8 U.S.C. § 1229a(b)(5)(D), it held that there is no appeal from an order of removal entered *in absentia*. The Sixth Circuit based its decision on Section 214.15 of Title 8 of the Code of Federal Regulations which provides that "[A]n appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered *in absentia*." (App. *infra*, 5a).

REASONS FOR GRANTING THE PETITION

This is an immigration case in which important issues regarding the jurisdiction of federal courts have been raised. If federal courts have absolutely no jurisdiction to review an *in absentia* removal order as the Sixth Circuit ruled, then important constitutional procedural due process issues are raised as well. This petition should be granted to resolve these important statutory and constitutional issues.

A. Congress Exercised Its Authority to Limit the Jurisdiction of Federal Courts When It Enacted 8 U.S.C. § 1229a(b)(5)(D).

Congress has the authority to limit the jurisdiction of federal courts as long as it does so within constitutional limits. *Webster v. Doe*, 486 US 592 (1988). Congress exercised this authority when it enacted § 1229a(b)(5)(D) of the Immigration and Nationality Act. This section provides in relevant part:

> "Effect on judicial review.
> Any petition for review under section 1252 of this title of an order entered *in absentia* under this paragraph shall (except in cases described in section 1252(b)(5) of this title [addressing nationality claims]) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D).

By enacting this statute, Congress expressly provided for federal court jurisdiction over *in absentia* removal orders. Quite notably, Congress did not enact a statute that completely divested federal courts with jurisdiction over *in absentia* removal orders. Had Congress chosen to enact a statute completely divesting federal courts with jurisdiction over such removal orders, which by their very nature result in a serious infringement on an individual's constitutional rights, serious questions concerning the constitutionality of the statute would be raised. *See*, *Webster*, *supra*. This petition for certiorari should be granted to clarify the scope of federal court jurisdiction over *in absentia* removal orders mandated by Congress in the INA.

B. Misplaced Reliance on Statute and CFR Improperly Limits Judicial Review Of *In absentia* Removal Order.

The Board of Immigration Appeals (BIA) summarily ruled on Petitioner's appeal by determining it lacked jurisdiction to review her *in absentia* removal order. In its one paragraph order dated May 31, 2001, the Board addressed the August 18, 2000 *in absentia* order of the Immigration Judge, stating:

> "The respondent seeks to challenge the Immigration Judge's decision but has done so by filing an appeal with the Board, rather than by filing a motion to reopen with the Immigration Judge in accordance with section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C). Under these circumstances, the record will be returned to the Immigration Court without further Board action as we are precluded by the Act from considering such an appeal. *See Matter of Guzman*, Interim Decision 3392 (BIA 1999). Accordingly, the record is returned to the Immigration Court."

Section 240(b)(5)(C) of the INA, 8 U.S.C. § 1229a(b)(5)(C) allows aliens to appeal an *in absentia* order in extremely limited circumstances. The alien must demonstrate she was absent from the hearing due to extraordinarily exceptional circumstances and in almost all instances, the alien must file such a motion 180 days after the *in absentia* order has been entered. By the time the BIA ruled that this was Petitioner's only recourse, the 180-day time period had long since expired. Accordingly, this matter was appealed.

En route to ruling on Petitioner's *Motion for a Stay*

of Deportation Proceedings, the court of appeals determined that she was not required to file a motion to reopen her proceedings since this would have been futile (App. *infra*. 10a)(quoting *Ohio v. Roberts*, 440 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act.")). However, when the court of appeals ruled on her appeal, it held that she *was* required to file a motion to reopen her proceedings. The court of appeals relied on both section 240(b)(5)(C) of the INA, 8 U.S.C. § 1229a(b)(5)(C) and the Code of Federal Regulations, 8 C.F.R. § 214.15, and affirmed the decision of the BIA which essentially held that absent extraordinarily exceptional circumstances, there is no judicial review of an *in absentia* removal order.

Section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C) provides in pertinent part:

> "Such an order may be rescinded only–
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(D).

Section 214.15 of Title 8 of the Code of Federal Regulations

provides in pertinent part: "no appeal shall lie from an order of removal entered *in absentia*." This section conflicts with the statutory language set forth in section 240(b)(5)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(D) which provides in pertinent part:

> "Effect on judicial review.
> Any petition for review under section 1252 of this title of an order entered *in absentia* under this paragraph shall (except in cases described in section 1252(b)(5) of this title [addressing nationality claims]) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) **whether or not the alien is removable**." 8 U.S.C. § 1229a(b)(5)(D)(Emphasis supplied).

Even though Section 240(b)(5)(D) of the INA provides for limited judicial review, the court of appeals stated that the "obvious negative implication of" section 240(b)(5)(C) of the INA was that the "BIA will not hear appeals of removal orders rendered *in absentia*." The court of appeals indicated that this was "further clarified by the INS regulation" which provides that "no appeal shall lie from an order of removal entered *in absentia*. 8 C.F.R.§ 214.15." The court of appeals then concluded that the BIA properly denied Petitioner an opportunity to appeal the IJ's *in absentia* removal order.

Substantial issues regarding whether Petitioner was in fact removable under the INA were raised in the immigration court. Prior to rendering her removable *in absentia*, the IJ indicated that had Petitioner been present, she would have given her legal memorandum addressing her removability considerable weight (App. *infra*. 41a). Section 240(b)(5)(D) of the INA provides for limited judicial review of *in absentia*

removal orders, including judicial review of issues addressing "whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D). The Petitioner specified in her Notice of Appeal which was filed with the BIA that she was contesting the IJ's determination that she was removable. However, the court of appeals affirmed the BIA's determination that it lacked jurisdiction over her appeal (App. *infra* 1a - 8a). In doing so, the court of appeals limited judicial review over *in absentia* removal orders in spite of the clear statutory language set forth in section 240(b)(5)(D) of the INA.

Thus, the court of appeals, by negative implication, construed the INA and relied on a regulation to limit federal court jurisdiction. This Court has instructed that the clear language of a statute, rather than a regulation, must be followed. *See*, *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 484 (2001)(rejecting agency's interpretation of a statutory requirement since the interpretation conflicted with the "structure and manifest purpose" of the statute); *Brown v. Gardner*, 513 U.S. 115, 122 (1994)(holding that a regulation which "flies against the plain language of the statutory text exempts courts from any obligation to defer to it"). This petition for a writ of certiorari should be granted to address whether the court of appeals properly relied on section 240(b)(5)(C) of the INA and 8 C.F.R. § 214.15 to limit judicial review of *in absentia* orders even though section 240(b)(5)(D) of the INA defines the parameters of judicial review of such orders.

C. Circuits Differ in Defining Basis of Federal Court Jurisdiction Over *In absentia* Removal Orders.

In *Herbert v. Ashcroft*, 325 F.3d 68 (1st Cir., 2003), the First Circuit relied on section 240(b)(5)(D) to delineate the parameters of its judicial review of an *in absentia*

removal order. The petitioner in *Herbert*, like the petitioner in this matter, was a lawful permanent resident and the parent of a minor United States citizen. An *in absentia* removal order was entered against him when, after attending several hearings, he was approximately 30 minutes late for his final hearing. He filed a motion to reopen his proceeding with the immigration judge (IJ), which was denied. He then appealed this denial to the BIA, which summarily affirmed the decision of the IJ.

Unlike the Sixth Circuit, the First Circuit relied on the statutory language in 8 U.S.C. § 1229a(b)(5)(D) as a basis for its jurisdiction to review the *in absentia* order. The court of appeals explained: "A petition for review challenging an order entered *in absentia* is, by statute, 'confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.' 8 U.S.C. § 1229a(b)(5)(D)." Reviewing the petitioner's case under these statutory guidelines, the court of appeals ultimately reversed the decision of the BIA.

Likewise in *Celis-Castellano v. Ashcroft*, 298 F.3d 888 (9th Cir., 2002), the Ninth Circuit relied on section 240(b)(5)(D) as the statutory provision granting it authority to engage in limited judicial review of an *in absentia* removal order. Once again, the court of appeals explained that when the issue is review of an *in absentia* removal order, "the statute provides that '[a]ny petition for review...[shall] be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.' 8 U.S.C. § 1229a(b)(5)(D)." Incidentally, unlike the First Circuit, in this case the Ninth Circuit denied the petition and thereby affirmed the decision of the BIA to deny the petitioner's motion to reopen the proceedings.

In this case, although the court of appeals of the Sixth

Circuit referred to the statutory language immediately preceding section 240(b)(5)(D), it relied on a regulation for the proposition that there was no judicial review of *in absentia* removal orders. Based on these divergent decisions, presently it is unclear whether federal courts maintain jurisdiction to review *in absentia* removal orders as suggested by 8 U.S.C. § 1229a(b)(5)(D), or whether the federal courts are precluded from exercising such jurisdiction because of 8 C.F.R. § 214.15. This petition for a writ of certiorari should be granted to resolve this important issue of federal court jurisdiction over *in absentia* removal orders.

D. Interpretation of INA and CFR Violated Petitioner's Constitutional Right to Procedural Due Process.

After the 180-day period for filing a motion to rescind an *in absentia* removal order had passed, the BIA returned Petitioner's timely filed appeal and stated that her only recourse was to file a motion to rescind the *in absentia* order under section 240(b)(5)(C) of the INA. On appeal, the court of appeals affirmed the decision of the BIA and held that federal courts do not have jurisdiction to review an *in absentia* removal order (App. *infra* 1a - 8a). The court of appeals reached this conclusion even though section 240(b)(5)(D) provides that a petitioner may raise on appeal the issue of whether s/he is removable. *See*, 8 U.S.C. § 1229a(b)(5)(D).

The resulting end of this decision is that aliens like Petitioner are denied any opportunity or forum to contest a finding that they are removable. In this particular case, Ms. Najwa Bakal, the petitioner, is married and the mother of 2 minor children who are United States citizens. As a teenager, she pled guilty after shoplifting at a local department store. She was placed on probation and

sentenced to a youthful trainee program. This conviction, which eventually led to the INS seeking her removal, was expunged before removal proceedings were commenced against her. Nevertheless, she was found removable and an *in absentia* order was entered against her.

The IJ who entered the *in absentia* removal order stated that had she appeared at the third and final hearing, she would have given her legal memoranda on whether she was removable considerable weight (App. *infra* 41a). Quite possibly the IJ believed Ms. Bakal would have an appellate forum to contest the finding that she was removable. But she did not.

The BIA's refusal to exercise jurisdiction over Petitioner's appeal deprived her of her constitutional right to due process since she was not afforded a forum to contest the determination that she was removable. The court of appeals quickly disposed of Petitioner's due process argument by stating that procedural due process requires an "opportunity to be heard" and that the Petitioner had the opportunity to be present at her *in absentia* hearing but missed this opportunity (App. *infra* 1a - 8a). The court of appeals misapprehended Petitioner's due process argument to the extent it interpreted it in reference to the *in absentia* hearing.

Under the INA, an alien ordered removable *in absentia* has the express statutory right to appeal this finding. 8 U.S.C. § 1229a(b)(5)(D). Petitioner thus argued that her right to due process was violated not at the point where the IJ entered an *in absentia* removal order, but at the point where the BIA summarily refused to exercise jurisdiction over her appeal. The BIA refused to exercise jurisdiction over her appeal because she did not file a motion to rescind her *in absentia* order. However, the statute does not require a petitioner to file a motion to rescind a removal order as a prerequisite for appealing an *in absentia* removal order under section 240(b)(5)(D). The court of appeals relied not on

section 240(b)(5)(D), but on section 240(b)(5)(C) and 8 C.F.R. § 214.15 and determined that she was not entitled to a forum to raise issues regarding her removability. Both this decision, and the decision of the BIA, deprived Petitioner of her constitutional right to due process.

An alien's right to due process was established years ago. *See, Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (stating that "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."). The court of appeals determined that federal courts do not have jurisdiction to review an *in absentia* removal order. Unlike other circuits, with this ruling the Sixth Circuit has closed its doors to aliens seeking a forum to contest their removability. The Petitioner in this case was denied her constitutional right to due process by the court of appeals' failure to adhere to the statutory language set forth in 240(b)(5)(D). This petition for a writ of certiorari should be granted to resolve these important issues regarding an alien's right to appeal an *in absentia* order under section 240(b)(5)(D) of the INA.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2003

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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No. 01-3719

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAJWA BAKAL,	)
	)
Plaintiff-Appellant,	) ON APPEAL
	) FROM THE
v,	) UNITED STATES
	) BOARD OF
JOHN ASHCROFT, Attorney General,	) IMMIGRATION
and IMMIGRATION AND	) APPEALS
NATURALIZATION SERVICE,	)
	) OPINION
Defendant-Appellees.	)
	)

Before: **MERRITT and GILMAN, Circuit Judges; and TARNOW, District Judge.***

ARTHUR J. TARNOW, District Judge. Najwa Bakal was ordered deported *in absentia* by a United States Immigration Court after failing to appear for her deportation

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* The Honorable Arthur J. Tarnow, United States District Court Judge for the Eastern District of Michigan, sitting by designation.

hearing. The Board of Immigration Appeals (BIA) of the Immigration and Naturalization Service (INS) refused to consider Bakal's appeal because a statute and an INS regulation establish that the exclusive means for appealing an *in absentia* deportation order is to file a motion to reopen the proceedings with the Immigration Court. Bakal appeals the BIA's refusal to examine the Immigration Court's *in absentia* deportation order. For the reasons set forth below, we **AFFIRM** the decision of the BIA.

I. BACKGROUND

A. Factual Background

Petitioner Najwa Bakal is a citizen and native of Iraq who entered the U.S. as a visitor for pleasure on or about march 28, 1993. On August 26, 1994 she pleaded guilty to First Degree Retail Fraud in Michigan (Mich. Com Laws Ann. § 750.356c, theft of merchandise valued at greater than $1000), for which she was admitted to a youthful trainee program and sentenced to probation. When she sought lawful permanent resident status with the INS on September 30, 1995, she indicated on her application that she had not "been arrested, cited, charged, indicated, fined, or imprisoned for breaking or violating any law or ordinance." On March 7, 1996, Bakal was adjusted to lawful permanent resident status by the INS.

B. Procedural Background

On October 14, 1999, Bakal was charged with being removable by the INS on three counts: 1) that at the time of her adjustment to lawful permanent resident status, she had been convicted of, or had admitted to committing a crime of moral turpitude (8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182 (a)(2)(A)(i)(I); 2) that within five years after her admission to the U.S., she was convicted of a crime

involving moral turpitude (8 U.S.C. § 1227(a)(2)(A)(i)); and 3) that at the time of her adjustment of status, she was inadmissible because she willfully misrepresented a material fact on he adjustment of status application (8 U.S.C. § 1227(a)(1)(A) and (8 U.S.C. § 1882(a)(6)(C)(i)).

On February 16, 2000, a removal hearing was held by an Immigration Judge (IJ) wherein Bakal denied the charges of removability. This hearing was continued to July 12, 2000, and continued again to August 18, 2000. The IJ instructed Bakal at the February and July hearings that her failure to appear at the next scheduled continuation would result in an order of her deportation.

Bakal failed to attend the August 18, 2000 hearing. At this hearing, based on evidence submitted by the INS, including Bakal's signed plea to the retail fraud charge, the IJ ordered her deported to Iraq. The IJ's written decision states that Bakal had previously conceded her removability, that the INS had submitted documentary evidence establishing the truth of its factual allegations, and that Bakal's absence constituted an abandonment evidence establishing the truth of its factual allegations, and that Bakal's absence constituted an abandonment of her applications. On August 31, 2000, Bakal appealed the IJ's decision to the BIA, asserting that the record did not support a finding that she had been convicted of a crime of moral turpitude nor that she had engaged in fraud or misrepresentation of a material fact. On May 31, 2001, the BIA issued a per curiam order stating that it was precluded by statute from considering the appeal under 8 U.S.C. § 1229a(b)(5)(C). The BIA cited relevant BIA caselaw, noting that it required the Petitioner to file a motion to reopen with the IJ. On June 27, 2001, Bakal filed the instant appeal for review of the BIA's final decision not to examine the *in absentia* deportation order. On June 28,

2001, Bakal filed a motion for stay of deportation with this Court, which was granted on August 14, 2001.

II. JURISDICTION, SCOPE AND STANDARD OF REVIEW

This Court has jurisdiction to review the final decision of the BIA pursuant to 8 U.S.C. § 1252. We review questions of law in a deportation order de novo. *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). The Court will uphold the decision of the BIA if there is reasonable, substantial, and probative evidence in the record supporting the decision. *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992); *Koliadà v. INS*, 259 F.3D 482, 486 (6th Cir. 2001).

III. ANALYSIS

A. Under statute, INS regulation, and associated caselaw, the BIA did not err in denying review of the *in absentia* order of deportation

As part of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C) governs the process for seeking a recission of an order deporting an alien *in absentia*. This statute states:

> Such an order may be rescinded only–
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> (ii) upon a motion to reopen filed at any time

> if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. § 1229a(b)(5)(C).

The obvious negative implication of the above statute, i.e., that the BIA will not hear appeals or removal orders rendered *in absentia*, is further clarified by INS regulation: "[A]n appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered *in absentia*" 8 C.F.R. § 240.15. In addition, BIA caselaw clearly interprets the rule concerning *in absentia* removal orders where notice of the hearing was provided:

> Such a removal order may be rescinded if a motion to reopen is filed with the Immigration Judge within 180 days after the date of the order of removal and if the alien demonstrates that the failure to appear was because of exceptional circumstances.
>
> *Matter of Guzman*, Interim Decision 3392 (BIA 1999) (citing 8 U.S.C. § 1229a(b)(5)(C)(i).

The record indicates that on August 18, 2000, Bakal was ordered deported *in absentia* by the IJ. Petitioner nowhere contends that her failure to appear was because of exceptional circumstances. The record reflects that clear

notice of the hearing had been provided to her as well as the consequences of a failure to attend. Bakal does not contend that she did not receive notice of the August 18, 2000 removal proceeding. She also does not allege that she was in custody at the time of the hearing. Therefore, under 8 U.S.C. § 1229a(b)(5)(C), the BIA did not have authority to hear her appeal. The BIA's decision not to evaluate Bakal's appeal was proper as per statute, regulation, and caselaw, as was its indication that a motion to reopen would have been the appropriate course.

B. The BIA did not deny Procedural Due Process when it denied review of the Immigration Court's valid order entered after Bakal was afforded the opportunity of a fair hearing

Bakal contends that she has been denied Procedural Due Process because the underlying order of the Immigration Court is materially defective and she has been denied the right of review by the BIA. However, an examination of relevant Due Process standards shows that there is no violation in the proceedings below.

The Supreme Court has long held that once an alien has been admitted to lawful residence, Procedural Due Process mandates that "not even Congress may expel him without allowing him a fair opportunity to be heard." *Kwon Hai Chew v. Colding*, 344 U.S. 590, 598 (1953); see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (recognizing a Fifth Amendment right in deportation proceedings). The requirement of "a fair opportunity to be heard" is echoed in the Sixth Circuit, *E.g.*, *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975); *Sad v. INS*, 246 F.3d 811, 819 (6th Cir. 2001). *See generally Detroit Free Press v. Ashcroft*, 303 F. 3d 681, 687-690 (6th Cir. 2002). Other Circuits have directly addressed the issues of *in*

absentia deportation and Due Process, finding accord where a fair hearing has been offered. *E.g., Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989) ("An *in absentia* deportation is legitimate if the alien had a reasonable opportunity to be present and failed to provide reasonable cause for his absence."); *Shah v. INS*, 788 F.2d 970, 972 (4th Cir. 1986) (affirming an *in absentia* deportation order where the alien had reasonable opportunity to attend the hearing); *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986) ("The fact that the hearing was held *in absentia* is not *per se* violative of due process.").

Bakal was given a fair opportunity to be heard at her deportation hearing. Her claim of a denial of Due Process simply ingnores (sic) the reality that she failed to attend her own hearing. Generally, we are dubious of an alien's claim of violation of Procedural Due Process where the deportation order is entered because the alien has failed to attend her deportation hearing for less than exceptional circumstances. In such an instance, the alien has simply failed to prosecute her own case. The resulting *in absentia* order is akin to a default judgment. However, we do not comment here on issues of Due Process that might arise in the scenario where the government's charges or proofs of removability are clearly and materially defective. Such a case is not before us.

On the facts of this case, Bakal cannot successfully assert that the underlying decision of the IJ is materially defective for failing to meet the required "clear, unequivocal, and convincing" evidentiary standard for proving removability, 8 U.S.C. § 1229a(b)(5)(a). The INS did in fact submit sufficient evidence supporting the IJ's finding as to the charge against Bakal under 8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182(a)(2)(A)(i)(I). Together, these provisions render inadmissible an alien who is "convicted of, or who

admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record includes a copy of Bakal's plea of guilty to First Degree Retail Fraud, which was admitted into evidence at the August 18, 2000 hearing. This plea is signed by Bakal and states "I took merchandise from Lord & Taylor. I did not pay."

Theft is considered a crime of moral turpitude. *Matter of Grazley*, 14I. & N. Dec. 330, 332, available in 1973 WL 29441 (BIA 1973) (finding theft involves moral turpitude when a permanent taking is intended); Matter off Lopez-Meza, Int. Dec. 3423, available in 1999 WL 1223810 (BIA 1999). Bakal's plea document, along with other documents related to her criminal proceedings, stand as "clear, unequivocal, and convincing" evidence that she admitted committing a crime, or acts constituting material elements of a crime involving moral turpitude. Thus, the INS has adequately proven at least two of the three independently sufficient criteria of inadmissibility under 8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182(a)(2)(A)(i)(I). The IJ's order of deportation therefore stands on solid legal and factual grounds. Any conceivable Due Process concerns are allayed by the validity of the underlying decision of the Immigration Court.

IV. CONCLUSION

For the reasons set forth above, we **AFFIRM** the decision of the BIA not to review the Immigration Court's valid *in absentia* order that Petitioner be deported to Iraq.

APPENDIX B

No. 01-3719
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
AUG 14 2001
LEONARD GREEN,
Clerk

NAJWA BAKAL,

Petitioner,

v.

JOHN ASCROFT, Attorney General; IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER

Before: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

The petitioner, Najwa Bakal, seeks review of a ruling by the Board of Immigration Appeals dismissing her appeal from an immigration judge's *in absentia* order of removal. The Board ruled it lacked jurisdiction to consider the appeal. The petitioner now moves to stay her removal pending disposition of her petition for review. The INS opposes a stay and moves to dismiss the petition. The petitioner has filed a response in opposition to dismissal and in support of a stay.

The INS moves for dismissal on grounds that Bakal has failed to exhaust her administrative remedies. *See* 8 U.S.C. 1252(d)(1) (A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right). According to the

INS, Bakal could challenge the immigration judge's *in absentia* removal order only by filing a motion to reopen under 8 U.S.C. 1229a(b)(5)(C). This section provides that an order of removal may be rescinded upon a motion to reopen if the alien demonstrates exceptional circumstances for failing to appear or lack of notice. However, in her response, Bakal asserts that the remedy of filing a motion to reopen is not available to her. She affirmatively states that "[a]t no time throughout the proceedings has [she] ever asserted that she failed to appear at her hearing because of exceptional circumstances or lack of notice." To require her to file a motion to reopen prior to seeking review of the Board's order dismissing her appeal would be pointless. *See Ohio v. Roberts*, 440 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."). Whether the Board was correct in determining it lacked jurisdiction to decide the appeal is an issue which will be addressed by the panel assigned to decide the merits of the petition.

Turning to the issue of Bakal's entitlement to a stay, the INS cites 8 U.S.C. 1252(f)(2) for the proposition that an order of removal may be enjoined only upon a showing "by clear and convincing evidence that entry or execution [of the removal order] is prohibited as a matter of law." The Ninth Circuit has, however, held that 1252(f)(2) does not limit the power of federal courts to grant stays of removal based on the traditional standards for granting a stay. *Andreiu v. Ashcroft*, 252 F.3d 277 (9th Cir., 2001). The factors to be considered by the court in determining whether a stay pending appeal should issue are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (1991). Upon

consideration of these factors, we conclude that a stay of removal is warranted.

The INS's motion to dismissed is **DENIED**. The petitioner's motion for a stay of removal pending disposition of her petition is **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

U.S. Department of Justice — Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22401

File: A70-267-719 - Detroit — Date: May 31, 2001

In re: BAKAL, NAJWA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Owen, Charles S., Esquire

ON BEHALF OF SERVICE: Mark J. Jebson

ORDER:

PER CURIAM. On August 18, 2000, the Immigration Judge issued a decision ordering the respondent removed after the respondent failed to appear at a scheduled hearing. The respondent seeks to challenge the Immigration Judge's decision, but has done so by filing an appeal with the Board, rather than by filing a motion to reopen with the Immigration Judge in accordance with section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C). Under these circumstances, the record will be returned to the Immigration Court without further Board action as we are precluded by the Act from considering such an appeal. *See Matter of Guzman*, Interim Decision 3392 (BIA 1999).

Accordingly, the record is returned to the Immigration Court.

/s/ signature illegible
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DETROIT, MICHIGAN

IN THE MATTER OF:
BAKAL, NAJWA DATE: Aug 18, 2000

CASE NO. A70-267-719

RESPONDENT IN REMOVAL PROCEEDINGS

DECISION

Jurisdiction was established in this matter by the filing on the Notice to Appear issued by the Immigration and Naturalization Service, with the Executive Office for Immigration Review and by service upon the respondent. See 8 C.F.R. sections 3.14(a), 103.5a.

The respondent was provided written notification of the time, date and location of the respondent's removal hearing. The respondent was also provided a written warning that failure to attend this hearing, for other than exceptional circumstances, would result in the issuance of an order of removal in the respondent's absence provided that removability was established. Despite the written notification provided, the respondent failed to appear at his/her hearing, and no exceptional circumstances were shown for his/her failure to appear. This hearing was, therefore, conducted *in absentia* pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act.

[✓] At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and

conceded removability. I find removability established as charged.

[✓] The Immigration and Naturalization Service submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. I find removability established as charged.

I further find that the respondent's failure to appear and proceed with any application for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution. See Matter of Pearson, 13 I&N Dec. 152 (BIA 1967); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); Matter of R-R-Interim Decision 3182 (BIA 1992).

ORDER:
The respondent shall be removed to IRAQ or in the alternative to on the charge(s) contained in the Notice to Appear.

/S/ ELIZABETH A. HACKER
Elizabeth A. Hacker
Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent Z1

SSS

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of File A 70 267 719

NAJWA BAKAL, Respondent

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before ELIZABETH A. HACKER, Immigration Judge

Date: February 16, 2000 Place: Detroit, Michigan

Transcribed by DEPOSITION SERVICES, INC., At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:	For the Respondent
Kathleen Alcorn, Esquire	Charles Owen, Esquire

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JUDGE FOR THE RECORD
This is a removal proceeding in the matter of Najwa Bakal, file A 70 267 719. Let the record reflect the respondent is present before Immigration Judge Elizabeth A. Hacker on February 16th, 2000, Government counsel is Kathleen Alcorn, it's the date and time set for this initial master calendar here in Detroit, Michigan.

JUDGE TO MS. BAKAL

Q. Good morning, Ms. Bakal.

A. Good morning.

Q. What language do you speak best?

A. I speak English but (indiscernible).

Q. Are you comfortable today proceeding in English?

A. Yes.

Q. I'm going to ask you to speak up just a little bit because that fan is just a touch loud for me.

A. Okay.

Q. What's your address in the United States?

A. 27016 Arden Park.

JUDGE TO MR. OWEN

Q. And, Mr. Owen, I show an address in Bloomfield on a different roady.

A. We did submit a change of address with the, with the –

Q. Oh you did, yes you did, it just didn't get

PAL

entered.
JUDGE TO MS. BAKAL
Q. And you appear to day with attorney Charles Owen,
do you wish Mr. Owen to be your attorney and speak for you?
A. Yes.
Q. All right.
JUDGE TO MR. OWEN
Q. And, Mr. Owen, on behalf of the respondent will you
acknowledge receipt of the Notice to Appear in this case, which
is dated October 15th, 1999, was issued, of course, being on the
respondent?
A. Yes, Your Honor.
Q. Do you claim, on behalf of respondent, having
explained these matters to her, do you waive a statement of the
nature and purpose of these proceedings and advisal of rights and
a reading of the charges?
A. Yes, I do.
JUDGE FOR THE RECORD
Then I will mark and admit as Exhibit 1, then, the
Notice to Appear.
JUDGE TO MR. OWEN
Q. Mr. Owen, I assume you're comfortable with
respondent's proceeding in English?
A. Yes.
Q. We'll change it to English then. If witnesses are

PAL

needed in another language, of course, as always remind the Court. How do you answer the factual allegations under subsection 3 in the Notice to Appear, numbered one through seven, and the two charges of removal under (indiscernible), strike that, three charges of removal under Section 237 (a) (1) (A), 237 (a) (2) (A) (i), and 237 (a) (1) (A) of the Act?

A. Your Honor, the respondent would admit allegations one, two, three, and six, and deny four, five, and seven, and consequently would deny all charges.

Q. Deny all charges.

JUDGE TO MS. ALCORN

Q. Ms. Alcorn?

A. Your Honor, we present to you, I apologize, there's a stain on the Service (indiscernible), Your Honor, I tried, also a 213 and –

Q. A mishap with coffee.

A. And an I-45 before (Indiscernible).

JUDGE TO MR. OWEN

Q. Mr. Owen, do you want to take a moment and look at it?

A. Please.

JUDGE FOR THE RECORD

I'll mark for identification, then, as Exhibit 2, the

certified record of conviction in case number 9464357X consisting of a warrant, assignment to youthful trainee status, information

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to return, that's a police entry card, and complaint, as Exhibit 3 for identification, and the 213.

JUDGE TO MS. ALCORN

Q. Also underneath that you have an application to adjust?

A. Yes, Your Honor.

JUDGE FOR THE RECORD

That will be Exhibit 4 for identification.

JUDGE TO MS. ALCORN

Q. Go ahead, Ms. Alcorn.

A. Your Honor, I'll submit to the Court that the conviction record establishes a conviction for allegation number four, I would note that it –

Q. All right, are you moving the admission of it?

A. Yes, Your Honor.

JUDGE TO MR. OWEN

Q. Mr. Owen, do you have any objections?

A. If I could take a moment just to review it? Your Honor, I have reviewed Exhibit 2 and have no objection to its admission.

JUDGE FOR THE RECORD

Strike that identification mark, it's admitted as a certified record of conviction of a Najol S-H-H-R-M-I-S.

JUDGE TO MS. ALCORN
Q. Okay, go ahead, counsel. Ms. Alcorn, he has no

objection to the admission of the –
A. Okay, Your Honor, I also move for the admission of the I-213, as well as the I-45, which I will note is signed by the respondent.
Q. I don't know who it's signed by, it's certainly signed with that name, but I don't know who, I cannot have, I do not have a signature of the respondent to compare it to, counsel, it would appear to be.
A. I think Mr. Owen will agree with that, his signature is also.
Q. We'll wait and see, Mr.
A. Mr. (indiscernible).
JUDGE TO MR. OWEN
Q. Mr. Owen?
A. I have no objection to Exhibit 4, the I-45, and again, I'll take a moment to look at the I-213, if I might?
JUDGE FOR THE RECORD
I'll admit the I-213.
MR. OWEN TO JUDGE
Q. I'm sorry, Your Honor?
A. I said I'll admit the I-213 since you have no objection.
Q. Your Honor, the respondent's assertion is –
A. Do you have no objection to the 45?
Q. I have, yes, Your Honor.

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A. No objection?
Q. No objection.
A. All right, well let's see if the Government is finished then.
JUDGE TO MS. ALCORN
Q. All right, Ms. Alcorn, anything further?
A. No, Your Honor.
Q. That's it?
A. Under the definition of conviction under 101(a)(48)(A), the Government would submit that assignment to youthful training status is sufficient for a conviction as it's defined under the Act, respondent had to plead guilty and then was sentenced to probation and although that is not expunged, but the one that's, once she has successfully completed that probation, it is a, complete for the Court's purposes under the definition of conviction, it stands a conviction for the Immigration Service.
Q. I'm puzzled about one thing –
A. Yes, Your Honor?
Q. Ms. Alcorn. I have a conviction for a Najol from, somewhat misspelled, I have a 213 in that name, and I have the 45, which was, does not, well it appears that the respondent, on arrival, on the I-94, indicated that her name was Najoi Hermiz, the spelling is certainly different, H-E-R-M-I-Z, there's no

indication of any other names used by her, and the name, of

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course, that appears on the Notice to Appear is Najwa Bakal –

A. Along with a.k.a

Q. Now I know –

A. Okay.

Q. Wait just a moment, please don't interrupt me.

A. No, Your Honor.

Q. We do have an a.k.a but you have laid nothing to link the Najoi Hermiz, other than listing it on the 862, to the individual convicted and the individual whose name appears on the 213.

A. Your Honor, I call the respondent to the stand to satisfy that.

Q. Well counsel, you've already rested and you were proceeding with your argument, I asked you if you had anything further. Do you wish to call the respondent at this time?

A. Yes, Your Honor.

JUDGE TO MS. BAKAL

Q. Ms. Bakal?

MR. OWEN TO JUDGE

Q. Your Honor, I think perhaps we can satisfy this issue and move onto (indiscernible) more substantive.

A. Do you acknowledge that your, that Ms. Bakal has

used the name of Najoi Hermiz?
Q. Yes, Your Honor.
A. As spelled on the conviction, and that the

conviction relates to her as does the 213?
Q. Yes, Your Honor.
A. All right. Very well then.
JUDGE TO MR. OWEN
Q. Go ahead, Mr. Owen.
A. Basically the respondent asserts that the assignment to a home youthful center, as presented by the Service, does not, not equate to a conviction under the Act, the Service has not established in the documentation that it has presented that the respondent made a plea, or in any way acknowledged the underlying facts that would be (indiscernible) to a conviction, and therefore the respondent's position is that the documentation presented by the Service does not establish a conviction.
JUDGE TO MS. ALCORN
Q. Ms. Alcorn?
A. Your Honor, I don't, I don't have with me, but I am familiar with the Michigan statute that does require under Michigan Homes Youthful Training Status that the respondent either admits sufficient facts or that the judge find that,

actually it's required that the respondent admit a plea of guilty to the criminal offense itself to be even assigned to that training status, and if the Court requires –

JUDGE TO MR. OWEN

Q. I am familiar with it as well, Mr. Owen, and the

statute, Homes Youthful Training Act does require it.

A. The statute may require it, Your Honor, but there's no, there is no evidence here that it occurred, and I don't believe that it can be properly inferred that it took place.

Q. Well I think that I can infer, however, that the parties have consented to the assignment of defendant to youthful trainee status. One of the conditions of youthful trainee status, under the statute, is an admission of eligibility.

A. Then I would assert that if it's an essential element it needs to be established by the Service not inferred by the Service.

MS. ALCORN TO JUDGE

Q. Your Honor, I don't mean to infer it at all, it's required under the statute and I don't have a copy of the statute but I would ask the Curt to take judicial notice of a criminal statute in Michigan in which we sit, not in our jurisdiction, but in the state that we sit in, and I know this Court is

familiar, I
18 am very familiar, and if the Court wants time, I could get a copy
19 of that for the Court, but I don't think that's necessary.
20 A. Okay.
21 MR. OWEN TO JUDGE
22 Q I'm not arguing the statute, Your Honor, I'm
23 arguing the documentation presented by the Service.
24 MS. ALCORN TO JUDGE
25 Q. Your Honor, I will submit to the Court that I have

1 presented to this Court and to Mr. Owen that the respondent
2 requested and was eligible to apply and was in fact applied for
3 and granted youthful training status, you had to admit the crime
4 in order to be granted that status. Now, had she not admitted
5 the crime, she may have gone to trial and found not guilty,
6 that's not what she did.
7 MR. OWEN TO JUDGE
8 Q. Again I'll reiterate, a plea, my assertion is the
9 establishment of a plea is an essential element and if the
10 Service doesn't present the plea, it can't simply rely on the
11 fact that a plea should have been taken under this statute, it
12 needs to establish that a please was taken under the statute, there
13 is nothing here to establish a plea other than an inference that

the statute was properly compiled with.
A. All right, counsel, I'm going to set this over briefly, until the end of the attorney docket, so counsel for the Government can provide me with the statute to complete the record and I'll rule at that time.
(OFF THE RECORD)
(ON THE RECORD)
JUDGE FOR THE RECORD
We're back on the record following a morning recess.
JUDGE TO MR. OWEN
Q. Mr. Owen?
JUDGE FOR THE RECORD

I'm marking as, and admitting as Exhibit 4, then, a copy of Assignment to Youthful Trainee Status.
MS. ALCORN TO JUDGE
Q. I think that's Exhibit 5, Your Honor, (Indiscernible).
A. Oh, you're right, it's Exhibit 5, the, I have them out of order. Thank you.
JUDGE TO MR. OWEN
Q. I'll give you a moment to look at that, Mr. Owen, since you've been served with it as well.
MS. ALCORN TO JUDGE
Q. If I may also draw the Court's attention, and Mr. Owen's attention, to footnote seven, I didn't get a chance to get the case, but - -
A. People v Dash?
Q. Yes, Your Honor.

JUDGE TO MR. OWEN
Q. Mr. Owen?
A. No objection to the admission of the statute, Your Honor.
Q. And I'm sure that your (indiscernible) does not change your posture in that the Service has not shown that such a plea was entered. Right?
A. That's correct, Your Honor.
Q. All right. And will you be seeking any forms of

relief, Mr. Owen? Let me indicate that while this is not a, obviously not an order, but will be reiterated in any final order I think that the statute coupled with the Michigan case law on this, and the fact that the record of conviction does indicate that the elements necessary to assign the respondent as defendant to the Homes Youthful Training Act were met, that the Court may reasonably find that the Court acted in accord with the governing statute and law, and all conditions were met. I will move for an expand on that, so I will ask you, do you designate a country to which removal is directed?
A. Your Honor, I would not at this time.
Q. All right.

A. I do believe that there's a secondary issue relating to the charge of misrepresentation and whether the intent to, whether the service has established intent, and I believe that would require a separate - -

Q. Finding on that?

A. Yes, Your Honor.

Q. All right. The 485 indicates, on the face of it, all right, and Mr. Owen, do you have any argument with respect to question number one on the 485? You have acknowledged that this is the respondent's signature?

A. I have not, Your Honor, but I would like the opportunity to present witnesses regarding her understanding of the Homes Youthful Assignee Act and also her understanding of the

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English language at that time.

Q. Well, we do have a master calendar right now.

A. I understand, Your Honor.

Q. Let's see what we've got for a hearing on that issue.

JUDGE TO MS. ALCORN

Q. Is the Government going to present any witnesses?

A. Your Honor, the, I'm not sure as of yet, the examiner who adjudicated this is not in Detroit anymore, and I'm really not sure where she is, so.

Q. Is July 12th enough time to see if you can locate

her?
A. Oh yeah, that's fine, Your Honor.
JUDGE TO COUNSEL
Q. July 12th at 4 o'clock on the issue of deportability.
MR. OWEN TO JUDGE
Q. And if I were to submit a memorandum regarding my position regarding homes, would that be agreeable, before that date?
A. That's fine, that's fine.
JUDGE TO MS. ALCORN
Q. The Government can submit their as well if they wish, all right?
A. Thank you, Your Honor.

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JUDGE TO COUNSEL
Q. Please ensure that everything compiles with the local operating procedures in terms of submission of witness lists and so on.
JUDGE TO MS. BAKAL
Q. Ms. Bakal, you must return on July 12th, 2000 at 4 o'clock in the afternoon. If you fail to appear, I have no choice but to order you removed and deported in your absence and unless your failure to appear was caused by exceptional circumstances beyond your control, such as your serious illness

or the serious illness or death of a close family member, you will not be eligible for certain relief under the Immigration law for a period of 10 years from that date. This includes future grants of voluntary departure, cancellation of removal, and the legal ability to change or adjust your immigration status while remaining in the United States. All right?

A. Okay.

JUDGE TO MR. OWEN

Q. Mr. Owen, since the, I will accept your brief on your position so the record is complete, but you can assume that it will have to be extremely persuasive. If you will be filing applications for relief, such as asylum or withholding, I will expect you to have it ready at that time to file. All right?

A. Very well, Your Honor.

Q. And Convention Against Torture, any explanations

you wish to make at that time vis a vie the failure to file within a year.

JUDGE TO MS. ALCORN

Q. Or evidence of filing if that is in the Government's file. All right?

A. Very good, Your Honor.

JUDGE FOR THE RECORD

All right, the matter is adjourned under the terms and conditions I've set.

HEARING CONTINUED

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of

File A 70 267 719

NAJWA BAKAL,
Respondent

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before ELIZABETH A. HACKER, Immigration Judge

Date: July 12, 2000 Place: Detroit, Michigan

Transcribed by DEPOSITION SERVICES, INC., At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:

For the Respondent

Charles Owen, Esquire

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JUDGE FOR THE RECORD
This is a continued removal proceeding in the matter of
Najwa Bakal, also known as Najoi Hermiz, file A 70 267 719. Let
the record reflect the respondent is present before Immigration
Judge Elizabeth A. Hacker sitting in Detroit, Michigan on July
12th, 2000 , this case was continued to allow the Government to
present evidence on the issue of the denied factual allegations
and the denied charges of removal. However, and we do have some
documents here, however, pursuant to an agreement of the parties,
we are going to continue the case for approximately 30 days to
allow some further investigation, and I will set this for August
18th , 2000 at 1 o'clock.
JUDGE TO COUNSEL
Q. Is that agreeable, Gentlemen?
A. (Trial attorney) Yes, Your Honor.
Q. Are you here?
A. Yes.
JUDGE TO MR. OWEN
Q. Mr. Owen are you?
A. August 18th, yes, I'm here.
Q. All right. We'll set it for 1?
A. 1? Okay, sure. Yes, that's fine, I was just thinking something else.
Q. All right, I'm going to make a note here that we

have discussed a possible withdrawal of the fraud charge on an agreement for voluntary departure, but the parties are going to investigate the likelihood of the respondent's returning to Canada as a landed immigrant, correct, Mr. Owen?

A. Yes, Your Honor.

Q. All right.

JUDGE TO MS. BAKAL

Q. Ma'am, you must return on August 18th, 2000. If you fail to appear, I have no choice but to order you deported in your absence, and unless your failure to appear was caused by exceptional circumstances beyond your control, like your serious illness or the death of a close family member, you will be barred from certain relief under the Immigration laws for 10 years, this includes voluntary departure, cancellation of removal, and the legal ability to change or adjust your immigration status while you remain in the United States. Do you understand?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

There being nothing further, well.

JUDGE TO MR. OWEN

Q. I'll have Shondra put on the notice and give it to

you at the window, Mr. Owen.
A. Thank you, Your Honor.
JUDGE FOR THE RECORD
And the cases stand adjourned.

PAL

(OFF THE RECORD)
(ON THE RECORD)

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of File A 70 267 719

)
) IN REMOVAL PROCEEDINGS
NAJWA BAKAL,)
)
Respondent)
) Transcript of Hearing

Before ELIZABETH A. HACKER, Immigration Judge

Date: [August 18, 2000] Place: Detroit, Michigan

Transcribed by DEPOSITION SERVICES, INC., At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:

Mark Jebson, Esquire

For the Respondent

Charles Owen, Esquire

PAL

JUDGE FOR THE RECORD
This is a removal proceeding in the matter of Najwa Bakal, also known as Najoi Hermiz, file A 70 267 719. Let the record reflect it is 1:22 in the afternoon, the respondent is not present, this matter was set for 1 o'clock on today's date.
Present on behalf of the respondent is her counsel, Charles Owen, also on behalf of the Government is attorney Mark Jebson, this is, this case was set by notice to respondent's counsel and the respondent had been present previously at the last hearing on July 12th when this case was set over to, and advised by this Court of the consequences of her failure to appear. The Court would note that the respondent has admitted allegations one, two, and three on the Order to Show Cause, denied allegations four and five, admitted allegation six, and denied allegation seven. She has denied all three charges of removal, the case was set over to consider the respondent's arguments on issues in this case. The Government has previously submitted, as Exhibit 2, copies of the conviction record in this case, as Exhibit 3 the Form I-213, as Exhibit 4 a copy of the respondent's application for

adjustment
of status, filed with the Immigration Service in 1995, as Exhibit
5 a copy of the state statute on assignment to the so-called
Homes Youthful Trainees Act, that is the assignment of
individuals 17 to 21 to youthful trainee status, on the issue of
whether or not a conviction exists for immigration purposes.
I've reviewed these matters, considered it, and considering the

fact that the respondent, pursuant to statute, did enter a plea
of guilty to the conviction, the Court finds that the requisite
elements of 101(a) (48) have been met in her conviction and I
would further note that based upon the conviction, which occurred
as indicated in 1994, the respondent, in her application for
adjustment of status, did not disclose that on the application
and. Therefore, all of the charges of removal have been sustained
by the requisite standards of clear and convincing evidence, that
is the respondent did, under penalty of perjury, declare that she
had never been arrested or convicted, that was a material fact
since she was applying for adjustment of status, a

conviction
could have, would have led to the consideration of exclusion
under Section 212 (a)(2)(A)(i) of the Act if disclosed and, or
conceivably, and therefore the Court will find that all of the
factual allegations are sustained. The respondent, having failed
to appear, has failed to establish eligibility for any form of
relief, all forms of relief are deemed to be denied. The Court
has designated Iraq as the country to which removal will be
directed in an order consistent with this, a written order
consistent with this written order will be entered and that will
be ordering that the respondent be removed and deported from the
United States to Iraq on the charges contained in the Notice to
Appear. Both sides will be served with a summary decision, or
rather a written decision in this case, and the case is closed,
the record if completed.

A 70 267 719 20

PAL

(OFF THE RECORD)
(ON THE RECORD)
JUDGE FOR THE RECORD
Back on the record only very briefly. Since counsel
for the Government did point out to me that they did submit a

record of her plea of guilty.
JUDGE TO MR. JEBSON
Q. Counsel, I assume that you want that marked and admitted as an exhibit?
A. Yes, please, Your Honor.
JUDGE FOR THE RECORD
I'll mark and admit that as Exhibit 6, which also reflects the, in addition to the statute, the fact that the respondent has made a plea, entered a plea of guilty.
JUDGE TO MR. OWEN
Q. Mr. Owen, you've request that the Court consider your brief, I did review your brief in the matter and would have certainly given it a great deal of consideration had you, had your respondent appeared. Since it is a memorandum of law, however, it is not an exhibit, but it is in the record, sir.
A. Very good.
Q. All right.
JUDGE FOR THE RECORD
The matter is now closed, now, hopefully, complete
HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before ELIZABETH A. HACKER in the matter of:

NAJWA BAKAL

A 70 267 719

Detroit, MI

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration review.

/s/ Patricia Lindenmuth

(PATRICIA LINDENMUTH, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

October 27, 2000

(Completion Date)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

NAJWA BAKAL

Petitioner

v.

JOHN ASHCROFT, Attorney General; IMMIGRATION AND NATURALIZATION SERVICE

Respondents

FILED
FEB 28 2003
LEONARD
GREEN,
Clerk

Before: **MERRITT** and **GILMAN**, Circuit Judges; **TARNOW**, District Judge.*

Upon consideration of the petition for rehearing filed by the petitioner,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

Supreme Court, U.S
FILED
SEP 24 2003
OFFICE OF THE CLERK

(2)

No. 03-132

In the Supreme Court of the United States

NAJWA BAKAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
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12 pp

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals (BIA) correctly dismissed petitioner's appeal of an *in absentia* removal order when petitioner failed to follow the statutory procedure for challenging the order.

2. Whether the BIA's dismissal of petitioner's appeal, for failure to follow the required procedure, denied petitioner due process.

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In the Supreme Court of the United States

No. 03-132

NAJWA BAKAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter, but is reprinted in 56 Fed. Appx. 650. The per curiam order of the Board of Immigration Appeals (Pet. App. 12a-13a) and the decision of the immigration judge (Pet. App. 14a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2003. A petition for rehearing was denied on February 28, 2003 (Pet. App. 43a). On May 20, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 2003. The petition for a writ of certiorari was filed on

July 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 545(a), 104 Stat. 5061, Congress took steps to reduce the frequency with which criminal aliens and other aliens failed to appear at their scheduled deportation hearings. See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 150 (1990). Congress required the Immigration and Naturalization Service (INS) to provide aliens in removal proceedings written notice of, *inter alia*, the nature of the proceeding, the grounds for the INS's charge of removability, the alien's right to be represented by counsel, and the consequences of failing to appear at the proceeding. 8 U.S.C. 1229(a)(1) and (2). Congress then directed that an alien who fails to appear at his deportation hearing "shall be ordered removed in absentia if the [INS] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A).

If the alien received the statutorily required notice and was not prevented from appearing due to being held in federal or state custody, then the alien may not seek rescission of the removal order entered *in absentia* unless the alien moves "within 180 days after the date of the order of removal" to reopen the removal proceeding and "demonstrates that the failure to appear was because of exceptional circumstances (as defined in [8 U.S.C. 1229a(e)(1)])." 8 U.S.C. 1229a(b)(5)(C)(i).

Congress also addressed judicial review of removal orders entered *in absentia*, providing that review of such orders by a court of appeals "shall * * * be

confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. 1229a(b)(5)(D).

Administrative regulations incorporate the statutory requirements for obtaining reopening of an *in absentia* removal order in the immigration court. See 8 C.F.R. 1003.23(b)(4)(ii). The regulations further provide that an alien may not appeal the entry of an *in absentia* removal order directly to the Board of Immigration Appeals (BIA). 8 C.F.R. 1240.15. Rather, the alien may take an appeal to the BIA if the immigration judge (IJ) denies the alien's motion to reopen the removal proceeding. See *In re Guzman-Arguera*, 22 I. & N. Dec. 722, 723 (BIA 1999) (en banc) ("Only when an alien has exhausted this avenue of relief [by filing a motion to reopen] may he or she file an appeal with the [BIA].").

2. Petitioner is a native and citizen of Iraq. In March 1993, petitioner was admitted to the United States on a tourist visa. In August 1994, she pleaded guilty in Michigan to committing first degree retail fraud (theft of merchandise valued at greater than $1000), for which she was placed in a youth trainee program and sentenced to probation. Pet. App. 2a.

In September 1995, petitioner applied for adjustment of her immigration status to that of a lawful permanent resident of the United States. Petitioner falsely stated on her application that she had not been "arrested, cited, charged, [or] indicted * * * for breaking or violating any law or ordinance." Pet. App. 2a. In March 1996, the INS granted petitioner's application and adjusted her status to that of a lawful permanent resident. *Ibid.*

In October 1999, after discovering petitioner's false statement on her adjustment application, the INS com-

menced proceedings to remove petitioner from the United States based on her 1994 theft conviction and the false statement to the INS. Pet. App. 2a-3a (citing statutes).

In her removal proceeding before an IJ, petitioner denied that she is removable. Pet. App. 19a. In February 2000, the IJ continued petitioner's case until July 2000. The IJ advised petitioner that, if she failed to appear, she would face the possibility of being ordered removed *in absentia*. *Id.* at 30a-31a. In July 2000, the IJ further continued the proceeding until August 18, 2000, at 1 p.m., to allow additional investigation. *Id.* at 34a. The IJ again advised petitioner that if she failed to attend the hearing, she would face removal *in absentia*. *Id.* at 35a.

Petitioner did not appear at her removal hearing on August 18, 2000. In the presence of her counsel, the IJ reviewed and considered the record evidence concerning petitioner's removability. Pet. App. 37a-41a. The IJ sustained the INS's factual allegations, determined that petitioner is removable from the United States, and entered an *in absentia* order of removal to Iraq. *Id.* at 14a-15a, 39a-40a.

3. Petitioner did not file a motion with the immigration court to reopen her case, as she was permitted to do under 8 U.S.C. 1229a(b)(5)(C) and 8 C.F.R. 1003.23(b)(4)(ii) (to be codified; formerly codified as 8 C.F.R. 3.23(b)(4) (2002)). Instead, on August 31, 2000, petitioner appealed the IJ's removal order to the BIA. Petitioner contended in her appeal that the record did not support the IJ's finding of removability. See Pet. App. 3a.

In May 2001, the BIA entered a per curiam order dismissing petitioner's appeal and returning the record of the case to the immigration court. Pet. App. 12a-13a.

The BIA explained that a motion to reopen the IJ's proceedings would have been the correct way of challenging the *in absentia* removal order, and that the BIA lacked jurisdiction to hear petitioner's appeal. *Id.* at 12a.

4. Petitioner filed a petition for review of the BIA's decision in the United States Court of Appeals for the Sixth Circuit. After entering a stay of petitioner's removal pending its consideration of her petition for review, see Pet. App. 9a-11a, the court of appeals later denied the petition and affirmed the decision of the BIA, *id.* at 1a-8a. The court determined that, because 8 U.S.C. 1229a(b)(5)(C) and the implementing regulations establish reopening as the exclusive procedure for rescinding an *in absentia* order of removal, the BIA lacked authority to hear petitioner's direct appeal from the IJ's entry of her removal order. Pet. App. 4a-6a.

The court of appeals also rejected petitioner's argument that she was denied due process when the BIA dismissed her appeal. The court explained that petitioner "was given a fair opportunity to be heard" at her removal hearing and "simply failed to prosecute her own case." Pet. App. 7a. The court further concluded that the IJ's removal order was supported by the record evidence and "stands on solid legal and factual grounds." *Id.* at 8a. The court stated that the validity of the IJ's removal decision "allayed" "[a]ny conceivable Due Process concerns" in this case and made it unnecessary for the court to consider "issues of Due Process that might arise in the scenario where the government's charges or proofs of removability are clearly and materially defective." *Id.* at 7a, 8a.

On February 28, 2003, the panel denied petitioner's request for rehearing.

ARGUMENT

Petitioner contends that the Board of Immigration Appeals erred in dismissing her administrative appeal of the *in absentia* removal order, and that the BIA's dismissal order denied her due process. The unpublished decision of the court of appeals, upholding the BIA's action, is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. a. The BIA, upheld by the court of appeals, correctly applied the controlling statute and regulation. Section 1229a(b)(5)(C) of Title 8 of the United States Code states that a removal order entered *in absentia* following the alien's failure to appear "may be rescinded only * * * upon a motion to reopen." 8 U.S.C. 1229a(b)(5)(C)(i) and (ii). Consistent with Congress's establishment of an exclusive avenue of relief, agency regulations state that "no appeal shall lie" to the BIA "from an order of removal entered in absentia." 8 C.F.R. 1240.15 (to be codified; formerly codified as 8 C.F.R. 240.15 (2002)). Rather, an appeal may be taken to the BIA if the immigration judge denies the alien's motion to reopen the *in absentia* order. *In re Guzman-Arguera*, 22 I. & N. Dec. 722 (BIA 1999) (en banc). If the BIA denies such an appeal, the alien may challenge that decision, within the bounds set by Congress in 8 U.S.C. 1229a(b)(5)(D), by filing a petition for review in the appropriate court of appeals.

Applying that statutory framework in this case, the BIA and the court of appeals both correctly determined that petitioner's failure to file a motion to reopen with the IJ precluded petitioner from appealing her *in absentia* removal order to the BIA.

b. Because petitioner failed to follow the statutory procedures for challenging her removal order, petitioner's discussion of the scope of judicial review when the correct procedures *are* followed, see Pet. 7-11, is irrelevant to her case.

The court of appeals' grant of a stay pending appeal, on which petitioner also relies (Pet. 8-9), likewise does not aid petitioner. In granting a stay, the court of appeals stated (Pet. App. 10a) that it would have been futile for petitioner to file a motion to reopen with the IJ because petitioner had conceded that she cannot satisfy the statutory criteria for reopening the *in absentia* order, see 8 U.S.C. 1229a(b)(5)(C). The court of appeals therefore did not require petitioner to file a "pointless" motion to reopen with the IJ before it would review the BIA's dismissal of her administrative appeal. *Ibid.* Contrary to petitioner's suggestion (Pet. 9), there is no inconsistency between the court of appeals' procedural decision to review the BIA's order of dismissal without requiring further agency proceedings, and the court's determination on the merits that the BIA correctly dismissed petitioner's appeal due to her failure to follow the statutorily required procedures.

c. There is no conflict between the Sixth Circuit's unpublished decision in this case and the decisions of the First and Ninth Circuits that petitioner cites (Pet. 11-12). In *Herbert* v. *Ashcroft*, 325 F.3d 68 (1st Cir. 2003), and *Celis-Castellano* v. *Ashcroft*, 298 F.3d 888 (9th Cir. 2002), the aliens followed the statutory procedure of filing a motion to reopen, and the courts of appeals therefore reviewed the administrative removal decisions under 8 U.S.C. 1229a(b)(5)(D). See 325 F.3d at 70-71; 298 F.3d at 890-891. In this case, by contrast, petitioner did not file a motion to reopen and her procedural default required the BIA to dismiss her appeal.

The court of appeals correctly upheld the BIA's decision on the basis of petitioner's procedural default, without reference to Section 1229a(b)(5)(D)'s standards for judicial review in a case where there has not been a procedural default.

2. Petitioner's due process argument also lacks merit. Petitioner is flatly incorrect when she states (Pet. 13) that she was "denied any opportunity or forum to contest [the] finding that [she was] removable." As the court of appeals explained, petitioner "was given a fair opportunity to be heard at her deportation hearing. Her claim of a denial of Due Process i[gn]ores the reality that she failed to attend her own hearing." Pet. App. 7a. The court further noted that petitioner's "*in absentia* order is akin to a default judgment," which generally raises no due process concerns. *Ibid.*

Petitioner cites no authority for her further claim (Pet. 14-15) that it was a violation of due process to require her to file a motion to reopen in the immigration court, rather than taking an appeal to the BIA in the first instance. The requirement of seeking reopening ensures that, when an alien who failed to appear for a removal proceeding seeks to challenge the ensuing *in absentia* order, the IJ who considered the evidence will have the initial opportunity to consider the defaulting alien's arguments for avoiding removal.

A due process challenge to the procedures for review of *in absentia* orders is particularly unfounded on the facts of this case. Petitioner conceded in the court of appeals that she received notice of the August 18, 2000, hearing and that there were no "exceptional circumstances" that caused her failure to appear at that hearing. Pet. App. 10a. Furthermore, the court of appeals reviewed the record of petitioner's removal proceeding and independently determined that the INS proved

petitioner's removability by clear, unequivocal, and convincing evidence. *Id.* at 7a-8a; see 8 U.S.C. 1229a(b)(5)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
MICHELLE E. GORDEN
Attorneys

SEPTEMBER 2003